

BRB No. 99-1060 BLA

WILMA ELMS)	
(Widow of NOVELL ELMS))	
)	
Respondent)	
Claimant-)	
)	
v.)	
)	DATE ISSUED:
PEABODY COAL COMPANY)	
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF)	
WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	DECISION AND ORDER
OF LABOR)	

Party-in-Interest

Appeal of the Decision and Order Awarding Benefits on Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Raleigh, Illinois, for claimant.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (94-BLA-1327) of Administrative Law Judge Mollie W. Neal with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The relevant procedural history of this case is as follows: The miner filed an application for benefits on June 26, 1986. Director's Exhibit 44. The district director denied the claim on the ground that the miner did not establish any of the elements of entitlement. *Id.* The miner filed a second claim on March 31, 1993, which was denied by reason of abandonment. Director's Exhibits 1, 7, 9. The miner died on July 21, 1993.¹ Director's Exhibit 14. Claimant, the miner's spouse, submitted a letter to the district director dated August 10, 1993, in which she explained that the miner was unable to attend the examinations scheduled by the district director due to his illness and subsequent death. Director's Exhibit 10. The district director reinstated the miner's duplicate claim and treated claimant's letter as a request for modification of the denial of the claim by reason of abandonment. Director's Exhibit 33. Claimant filed an application for survivor's benefits on August 25, 1993. Director's Exhibit 12. This claim was consolidated with the miner's claim and transferred to the Office of Administrative Law Judges for a formal hearing before Administrative Law Judge Mollie W. Neal (the administrative law judge).

In her initial Decision and Order, the administrative law judge credited the miner with thirty five and three-quarter years of coal mine employment and determined that the evidence of record submitted since the district director's rejection of the miner's first claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied the miner's claim under 20 C.F.R. §725.309(d). With respect to the

¹Dr. Sloan, the miner's treating physician, prepared the death certificate and identified the cause of death as cardiac arrest due to coronary artery disease and congestive heart failure. Director's Exhibit 14. Dr. Sloan identified pneumoconiosis as a significant condition contributing to the immediate cause of death. *Id.*

survivor's claim, the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found that claimant demonstrated that pneumoconiosis was a contributing cause of the miner's death under 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded in the survivor's claim.

Employer filed an appeal with the Board. In a Decision and Order issued on February 24, 1998, the Board affirmed the denial of benefits with respect to the miner's claim and the administrative law judge's findings under 20 C.F.R. §§718.202(a)(1)-(3), 718.204(c), 718.205(c)(1) and (c)(3), as unchallenged on appeal. *Elms v. Peabody Coal Co.*, BRB No. 97-0795 BLA (Feb. 24, 1998)(unpub.), slip op. at 2 n.1. The Board vacated, however, the administrative law judge's findings under Sections 718.202(a)(4) and 718.205(c)(2) and remanded the case to the administrative law judge for reconsideration of the medical opinions of record. *Id.* at 5-6. The Board instructed the administrative law judge to make specific findings regarding whether the reports of Drs. Sloan and Long constitute reasoned diagnoses of pneumoconiosis and to consider the miner's smoking history in assessing the probative value of the medical opinions of record. *Id.* at 6. The Board also indicated that the administrative law judge should provide a complete explanation of her weighing of the medical opinion evidence under Section 718.202(a)(4) in light of her determination that the x-ray evidence does not conclusively establish the presence or absence of pneumoconiosis. *Id.* at 6 n. 8.

On remand, the administrative law judge found that the medical opinions of Drs. Jones, Long, and Sloan were sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c)(2). Accordingly, benefits were awarded in the survivor's claim. Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical evidence and did not comply with the Board's remand instructions. Claimant responds and urges affirmance of the award of benefits. Employer has replied, essentially reiterating the arguments in its Brief in Support of Petition for Review. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.²

²The administrative law judge also issued a Supplemental Decision and Order Awarding Attorney's Fees in which she granted claimant's counsel's request for fees for services performed before the administrative law judge. Employer has not appealed the administrative law judge's Supplemental Decision and Order. However, no fee award is effective until there is a successful

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon considering the medical reports relevant to Section 718.202(a)(4), the administrative law judge determined that Dr. Jones's diagnosis of pneumoconiosis was adequately reasoned and documented, inasmuch as it is supported by positive x-ray readings performed by B-readers, the miner's treatment and hospital records which indicate that the miner's respiratory condition worsened over the years, and the reports of the miner's treating and attending physicians. 1999 Decision and Order at 3-5. The administrative law judge further determined that Dr. Jones's conclusions were corroborated by the opinions in which Drs. Sloan and Long stated that the miner had pneumoconiosis. *Id.* at 5. The administrative law judge discredited the opinion in which Dr. Renn maintained that the miner did not suffer from pneumoconiosis on the grounds that Dr. Renn relied too heavily upon the negative x-ray interpretations of record and the single pulmonary function study, which Dr. Renn determined was not valid, and "failed to explain his conclusions in light of the underlying medical documentation." *Id.* at 2, 4-5. The administrative law judge also found that Dr. Renn based his opinion upon the improper assumption that pneumoconiosis does not progress once exposure to coal dust ceases. *Id.* at 3-4. The administrative law judge concluded, therefore, that the weight of the medical opinion evidence supported a finding of pneumoconiosis under Section 718.202(a)(4). *Id.* at 5.

Employer asserts that the administrative law judge engaged in a selective analysis of the reports of Drs. Jones and Renn, inasmuch as she subjected Dr. Renn's opinion to a much higher level of scrutiny. Employer maintains that if the administrative law judge had examined Dr. Jones's report as closely, she would have determined that it was not reasoned and documented. Specifically, employer argues that the administrative law judge's determination that Dr. Jones reasonably relied upon the positive x-ray interpretations of record conflicts with the administrative law judge's finding that the x-ray evidence does not establish

prosecution of the claim and all appeals are exhausted. See *Goodloe v. Peabody Coal Co.*, 19 BLR 1-100 n.9 (1995).

the presence or absence of pneumoconiosis. Employer also notes that both the administrative law judge and Dr. Jones mischaracterized the comments accompanying Dr. Laucks's negative reading of the film dated May 20, 1993. Employer further asserts that Dr. Jones's references to the length of the miner's coal mine employment, possible tuberculosis, and the history of breathing problems as reflected in the miner's treatment notes and hospital records do not constitute evidence supportive of a diagnosis of pneumoconiosis.

These contentions have merit, in part. In her initial Decision and Order, the administrative law judge found that the negative and positive x-ray readings were equally probative and determined, therefore, that the x-ray evidence neither proved nor disproved the existence of pneumoconiosis. 1997 Decision and Order at 12-13. In the Decision and Order Awarding Benefits on Remand, the administrative law judge stated that it was "acceptable for Dr. Jones to rely upon the positive chest x-ray interpretations of record to support his finding of pneumoconiosis," as Dr. Jones asserted persuasively that as it progressed, the miner's congestive heart failure obscured the radiographic indications of pneumoconiosis, thereby accounting for the variability in the x-ray readings of record. 1999 Decision and Order at 4; Claimant's Exhibit 10. The administrative law judge also noted Dr. Jones's reference to Dr. Laucks's comment that it was "difficult to judge for the presence or absence of small opacities in this case because there is cardiomegaly, congestive heart failure with pleural effusions and interstitial pulmonary edema which can mimic small opacities." Director's Exhibit 38. As indicated by employer, however, Dr. Laucks's remarks suggest that due to the miner's cardiac conditions, a finding of pneumoconiosis on one of the miner's chest films could have been as erroneous as a negative interpretation. Moreover, Dr. Jones's own explanation of the split in the x-ray readings is premised upon the assumption that the interpretations of the early films were largely positive while the interpretations of the later films were mostly negative due to the masking effects of the miner's worsening congestive heart failure, but the x-ray readings of record do not conform to this pattern.

Employer is also correct in asserting that Dr. Jones's mere references to the miner's lengthy coal mine employment and history of respiratory problems do not, in and of themselves, constitute evidence of pneumoconiosis, particularly when the respiratory problems are not attributed to a coal-dust related condition.³

³The miner's hospital records related to the treatment of his congestive heart failure, but also contain diagnoses of pneumoconiosis, the objective bases for which are unclear. The references to pneumoconiosis appear as notations in the history section of the hospital admission records or as discharge diagnoses.

See generally Sahara Coal Co. v. Fitts, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Similarly, the administrative law judge's determination that Dr. Jones's opinion was bolstered by his comment that the sole pulmonary function study of record, which Dr. Renn invalidated, supported a diagnosis of pneumoconiosis because *persistent* failure to perform a valid study is common among miners who suffer from pneumoconiosis is not supported by substantial evidence, as the record contains only one pulmonary function study. Director's Exhibit 44; Claimant's Exhibit 9. In addition, the administrative law judge did not sufficiently explain her approval of Dr. Jones's citation to the opinions of the physicians who treated or examined claimant and her determination that the opinions of Drs. Long and Sloan support Dr. Jones's conclusions in light of the fact that she did not, as instructed by the Board, determine whether Drs. Long and Sloan provided reasoned and documented diagnoses of pneumoconiosis.⁴ *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. Director, OWCP*, 8 BLR 1-46 (1985). We reject employer's argument concerning Dr. Jones's putative diagnosis of tuberculosis related to coal dust exposure, however, as the administrative law judge did not rely upon this facet of Dr. Jones's report in determining that Dr. Jones provided a reasoned and documented diagnosis of pneumoconiosis. In light of the foregoing, we vacate the administrative law judge's finding that Dr. Jones's opinion is sufficient to establish the existence of

Director's Exhibit 16; Employer's Exhibit 4. Chest x-rays were taken during many of the miner's hospitalizations, but these films were not taken or read for the purpose of diagnosing pneumoconiosis.

⁴Dr. Sloan was the miner's treating physician from 1972 until the miner's death in 1993. The record contains Dr. Sloan's office notes, which consist of brief entries indicating treatment for dyspnea, coronary artery disease, atrial fibrillation, congestive heart failure, arthritis, and diabetes. Employer's Exhibit 4. Dr. Sloan listed pneumoconiosis as a diagnosis twice in these notes and in a discharge summary dated April 1, 1992. Director's Exhibit 16. He identified chronic obstructive pulmonary disease in a discharge summary dated July 13, 1993. Employer's Exhibit 6. After the miner's death, Dr. Sloan submitted a two-sentence letter in which he indicated that pneumoconiosis contributed to the miner's death. Director's Exhibit 17. He did not identify the medical tests or clinical observations supporting his conclusions. At the request of the district director, Dr. Long submitted a report of her review of the medical evidence of record. She also concluded that pneumoconiosis contributed to the miner's demise. Director's Exhibit 23. Dr. Long did not refer to any specific medical evidence.

pneumoconiosis under Section 718.202(a)(4) and remand the case to the administrative law judge for reconsideration of this opinion.⁵

With respect to the administrative law judge's consideration of Dr. Renn's opinion, employer asserts that the administrative law judge erred in determining that Dr. Renn did not explain his conclusions in sufficient detail and in determining that Dr. Renn relied upon the improper assumption that pneumoconiosis does not progress after coal dust exposure ceases. These contentions have merit. As employer states, in his written reports and his deposition testimony, Dr. Renn discussed the miner's medical and smoking histories and the objective evidence of record in detail and explained why these factors supported a diagnosis of a totally disabling cardiac condition rather than pneumoconiosis. Employer's Exhibits 16, 19, 28. The administrative law judge's finding that Dr. Renn somehow erred in failing to conclude that the severity of the miner's respiratory condition indicated the presence of pneumoconiosis and in failing to address "symptoms consistent with pneumoconiosis," appears to reflect the administrative law judge's substitution of her opinion for that of a medical expert. 1999 Decision and Order at 2, 5. In addition, although Dr. Renn indicated in response to questions posed by employer's counsel that pneumoconiosis does not develop or progress after a miner ends his coal mine employment, he provided a completely separate rationale for his determination that the miner did not have pneumoconiosis based upon his review of the objective evidence of record. Employer's Exhibit 19 at 17-41, 49-50; *see also* Employer's Exhibits 16, 28. Inasmuch as the administrative law judge did not accurately characterize Dr. Renn's opinion and relied upon determinations that fall within the province of a medical expert to discredit his conclusions, we vacate the administrative law judge's findings with respect to this opinion and instruct the

⁵Inasmuch as we have vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding, under 20 C.F.R. §718.203(b), that the pneumoconiosis arose out of coal mine employment. The administrative law judge should reconsider this finding if she determines that claimant has established the existence of pneumoconiosis on remand.

administrative law judge to reconsider it on remand. See *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

In light of the fact that the administrative law judge relied upon her findings under Section 718.202(a)(4) in weighing the evidence under Section 718.205(c)(2), we must also vacate the administrative law judge's determination that pneumoconiosis was a contributing cause of the miner's death. The administrative law judge must reconsider this issue if she finds the existence of pneumoconiosis established on remand. When reconsidering the medical opinions relevant to Sections 718.202(a)(4) and 718.205(c)(2), the administrative law judge must determine whether the reports are adequately reasoned and documented and set forth the rationale underlying her findings. See *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990), *cert denied*, 111 S.Ct. 385 (1991). In deciding the relative probative value of each opinion, the administrative law judge cannot mechanically accord greater weight to the diagnoses offered by treating or examining physicians, but rather must consider the respective qualifications of the physicians, the extent to which their reports reflect a thorough knowledge of the miner's occupational, medical, and smoking histories, and the extent to which their conclusions are supported by the underlying documentation. See *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Peabody Coal Co. v. Helms*, 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is vacated and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge